Administrative Judicial Reform in Hungary: Who Gives a Fig about Parliamentary Process?

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In the past few months, the Fidesz government has been working on the reform of the administrative judiciary at full speed with the assistance of the European monitoring bodies. The Constitutional Court recently had the opportunity to slow down the process of undermining the independence of the last stronghold of the rule of law in Hungary, by invalidating the reform legislative act on the basis of procedural irregularities. Even though the law had been adopted as a result of a chaotic parliamentary vote, the justices did not find a violation of the Fundamental Law. The outcome is not surprising, as the Court cannot be accused of exercising a particularly strong control over the parliamentary legislative process in general. What is puzzling, however, is the massive amount of hypocrisy manifested in the reasoning: the very same Court, which has, for the most part, failed to stop the abusive practices of the governing majority in respect of parliamentary law-making, gives the opposition MPs a lecture on the basics of parliamentary work and decorum.

The Court's decision: a textbook example of hypocrisy

Political attacks directed against judicial institutions has been one of the items on the top of the Fidesz-KDNP coalition's agenda ever since their entry into office in 2010. The first target was the Constitutional Court, thereafter, the Supreme Court and the restriction of judicial self-administration, and finally, the idea to reform the administrative court system was first floated in 2016. At the time, the government was a few votes shy of a qualified majority required for the amendment of the act on the judiciary – hence the enactment of a carefully drafted bill in an ordinary legislative procedure. The law was sent to the Constitutional Court for *ex ante* review by the President of the Republic. The justices concluded that all the challenged provisions concerned essential aspects of the judicial system requiring a qualified majority. Consequently, their adoption in an ordinary legislative procedure was found to be contrary to the Fundamental Law.

The governing majority redrafted the bill and Parliament enacted a watered-down version of the reform. However, when PM Orbán and his coalition returned for a third consecutive term with another two-thirds majority in 2018, they were determined to complete the reorganization of the administrative court system. That the main political goal behind the reform is to undermine the independence of the judiciary as the last effective part of the system of checks and balances, has been suspected

for quite some time by human rights NGOs and scholars. The remaining doubts must have been swept away by none other than the Speaker of the House, László Kövér (Fidesz-KDNP). A few days ago Kövér delivered a speech in which he sent a very clear message to the judges and scholars sitting in the audience: judicial independence is not a self-standing value, the responsibility of the judiciary is to defend the state (which can be seen as synonym for the governing majority in the vocabulary of Fidesz) from the attacks of the globalist forces who relentlessly work on the weakening of the nation states.

In late autumn last year, there were some promising signs indicating that the government may not be able to implement its reform plan. Sparked by the introduction of an amendment to the Labor Act – serving the primary purpose of making it possible for multinational companies to compel their employees to work hundreds of hours of overtime without full or immediate compensation – thousands of anti-government demonstrators took to the streets. The anger of the crowd was directed primarily at the so-called "Slavery Act", but the revocation of the judicial reform plan was also one of their main demands. In this political climate the parliamentary opposition was under a lot of pressure to take matters into their hands.

If minority MPs wanted to take action in the face of the oppression of a two-thirds governing majority in the unicameral National Assembly, they did not really have any other choice than to try to prevent the plenary from voting on the bills, as their proposals for amendments had been rejected indiscriminately by the House. Therefore, on the day of the final vote they physically blocked the Speaker's podium inside the chamber and blew whistles for more than two hours. Public disapproval or the opposition's objections has never been a reason for the government to change its reform plans, therefore the Speaker decided to proceed to the final vote no matter what, and the bills were eventually enacted.

The opposition parties – the socialists, the far-right, the greens and the who knows what – put aside their differences and filed a petition with the Constitutional Court, challenging the two laws on both procedural and substantive grounds. The Court separated the two types of issues and delivered its Decision no. 15/2019 (IV. 17) on the constitutionality of the parliamentary enactment. The petitioners based their request on three grounds. First, they submitted that the President of the chamber (one of the deputy Speakers) acted unconstitutionally when he decided to chair the Parliamentary session from the benches instead of the Speaker's podium. The justices did not buy this argument. The Court pointed out that the petitioners themselves had been blocking the way to the podium, so they could not base the unconstitutionality of the legislative process on their own irregular behavior. Nevertheless, the justices examined the petitioner's allegation and concluded that the chamber president had not acted contrary to the standing orders. In any case, the Court added, chairing the session from the podium cannot be considered to be a rule having constitutional significance.

Second, the petitioners argued that the chamber president had been assisted by two notaries from the parties of the governing majority, contrary to the Act on the National Assembly stipulating that one of them shall be selected from an opposition PPG. The justices said that the cited provision of the Act on the National Assembly

was not an absolute requirement, meaning that the chamber president had been allowed to deviate from the rule and to choose both notaries from among the members of the governing parties in exceptional circumstances. In addition, the petitioners submitted that the chamber president had been assisted not only by elected officers of the House, but also by ordinary MPs. However, the Court did not share the view that this had constituted a serious violation of the procedural rules.

Finally, the laws were challenged on the ground that the MPs had been able to cast a vote without inserting their card into the voting machine, which had potentially led to the manipulation of the results. The justices noted first that the use of electronic voting is not mandatory; other voting methods can be applied as well. The Court continued by saying that every MP has the constitutional duty to cast their vote personally, but the petitioners did not prove that the results had actually been manipulated. According to the parliamentary records everything had been in order and the Court did not find further reason for examining their accuracy.

In sum, the petitioners' arguments were rejected on every ground. Am I satisfied with the result? As a fierce supporter of a much stronger judicial review over the legislative process I am obviously not. But my emotions have tertiary importance. The Court's decision is by and large consistent with its previous jurisprudence. The problem is that the justices were not willing to break with those mistakes that characterize their approach. First, the Court always wants to find specific rules having constitutional significance which were violated during the process, instead of focusing on whether the process as such was compatible with the requirements stemming from the constitution itself. Second, the Court's evaluation of whether a specific procedural rule enjoys constitutional protection is not based on an established set of criteria, which renders the assessment quite unpredictable. Third, the different irregularities are always examined separately, instead of looking at their cumulative effect. Fourth, the Court does not find the law unconstitutional if the infringement of the standing orders can only be established after a complicated interpretation of the rules.

But again, the Constitutional Court – even before the successful court-packing under the Orbán government – has never been particularly activistic in this field. In general, constitutional court judges are usually quite reluctant to spend too much time and energy on the review of legislative process-related issues considered to have little, if any, constitutional significance, and prefer rushing to the juicy bits of the case lying in the substance.

What is truly troubling for me, however, is the sheer arrogance of a unanimous Constitutional Court and its complete mischaracterization of the underlying constitutional problem. The justices gave the opposition MPs a lecture on the basics of parliamentary work and their duties as deputies. The reasoning of the Court creates the impression that the actions of the opposition constituted a threat to the proper functioning of the constitutional order putting the Rule of the Law in peril. Yes, the minority MPs disturbed the work of the House and their actions can be characterized as contrary to the procedural rules. But nothing can be further from the truth than saying that the opposition is responsible for making the proper functioning of democratic institutions impossible. It is the Fidesz-KDNP coalition

who has rendered the parliamentary work meaningless in past nine years, and the Constitutional Court has been, for the most part, a passive spectator of the show.

Instrumentalization of parliamentary legislation

The Fidesz-KDNP coalition parties were voted into office in 2010 with a two-thirds majority in the unicameral National Assembly, which gave them significant leeway to implement their political program smoothly. Nevertheless, the cabinet, driven by revolutionary zeal, wanted to implement its pet projects as quickly as possible without any compromise. This led to – what I call – the "instrumentalization of parliamentary legislation" manifested in an unprecedented legislative hyperinflation, the radical acceleration of the law-making process at any cost, the strategic avoidance of consultation, let alone meaningful cooperation with the opposition parties and extra-parliamentary interest-groups. What needs to be emphasized is that shortly after the entry into office of the Fidesz-KDNP coalition, the parliamentary opposition was relegated to the role of simple background actors. Minority MPs were allowed to exercise their rights, of course, because the mere existence of the parliamentary opposition contributes to the illusion that Hungary is still a well-functioning democracy. However, their participation in the parliamentary decision-making became a mere formality.

On a number of occasions, the Constitutional Court was requested to review the constitutionality of legislative acts which had been adopted in a parliamentary process suffering from serious irregularities. These petitions gave the justices a perfect opportunity to stop the abusive practices deployed by the governing majority. However, the Court did not stand up for democracy when the governing majority introduced major legislative reforms and even constitutional amendments in the form of private member bills and adopted them without consulting the opposition (see e.g. Decision no. 61/2011). The justices did not find unconstitutional the disrespect of the cabinet's obligation to conduct preliminary consultations with the representatives of civil servants about the reform of the regulation on their status (Decision nos. 8/2011 and 29/2011) or with the affected interest-groups before the introduction of the media reform package (Decision 165/2011). In addition, the Court refused to invalidate the Church Reform Act even though it had been pushed through parliament in an extremely fast process and by violating essential procedural rules (Decision no. 6/2013).

To be fair, the Court did declare the complete redrafting of legislative proposals by last minute amendments unconstitutional (Decision no. 164/2011) and struck down the governing majority's attempts to amend qualified majority acts by laws enacted in an ordinary law-making procedure (Decision nos. 16/2015 and 1/2017). But these decisions were far from being enough to remedy the structural problems of the democratic decision-making.

Another aspect of the story needs to be highlighted to give you a full picture. Sick and tired of being constantly side-lined ever since 2010, minority MPs soon adopted a somewhat unconventional, "rebellious" behavior in the hemicycle to communicate their ideas in a way to attract the attention of the media. The governing majority

quickly reacted by amending the rules on disciplinary proceedings which have been used to silence the opposition ever since. Some minority MPs turned to the Constitutional Court for help, but the justices turned their face away (Decision nos. 3206/2013 and 3207/2013). Therefore, it fell on the European Court of Human Rights to establish the violation of the petitioners' right to freedom of expression in the Karácsony and Others case.

Instead of an obituary

The Hungarian democracy has been buried several times. Everybody points to a different date of death, but there is a consensus in the mainstream literature that Hungary has ceased to be constitutional democracy. Therefore, the current decision of the Constitutional Court may be regarded as another nail in the coffin. It is important to note, however, that the Court still has to decide on the substantive constitutionality of the administrative court reform. Not that I have high expectations, but we have to keep in mind that the story has not completely ended yet.
